IN THE DISTRICT COURT OF HOLT COUNTY, NEBRASKA

CHERIE BLIGH,

Plaintiff,

vs.

HOLT COUNTY SCHOOL DISTRICT NO. 45-0044, a/k/a STUART PUBLIC SCHOOLS, a political subdivision of the State of Nebraska,

Defendant.

Case No. CI02-90

JUDGMENT

DATE OF TRIAL: November 18, 2002.

DATE OF RENDITION: February 11, 2003.

DATE OF ENTRY: See court clerk's file-stamp date per § 25-1301(3).

APPEARANCES:

For plaintiff: Scott J. Norby with plaintiff.

For defendant: Steve Williams with corporate representative, Robert Hanzlik.

SUBJECT OF ORDER: Decision on the merits following trial to the court without a jury.

PROCEEDINGS: See journal entry rendered following trial.

FINDINGS: The court finds and concludes that:

1. The plaintiff seeks a declaratory judgment that the plaintiff's contract of employment by the defendant as a certified teacher remains in effect as a matter of law and related relief. The plaintiff asserts that the defendant failed to comply with its discharge and retention policy by failing to give the plaintiff notification of possible termination by March 13, 2002.

2. An action for declaratory judgment is sui generis; whether such action is to be treated as one at law or one in equity is to be determined by the nature of the dispute. *Spanish Oaks v. Hy-Vee*, 265 Neb. 133, ___ N.W.2d ___ (2003). When a dispute sounds in contract, the action is to be treated as one at law. The present action concerns the plaintiff's contract of employment as a teacher for the defendant school district. This court treats the case as an action at law.

3. The plaintiff's evidence consisted solely of documents received without objection, including a specific stipulation of facts. The defendant offered no additional evidence. The undisputed facts show that the plaintiff was employed as a teacher by the defendant for the 2001-02 contract year as a one-half-time permanent certificated employee. The defendant is a Class III school district under Nebraska law, which constitutes a type of political subdivision. The board of education determines the policies of the school district and employs administrative personnel to implement those policies.

4. The defendant publishes and distributes annually to its certificated staff a faculty handbook setting forth terms and conditions of employment for that school year. The board of education approves contents of the faculty handbook, which constitute district policy. The district followed the practice in the 2001-02 contract year, and the plaintiff received her copy. That handbook contains both Policy No. 3303 entitled "Discharge and Retention" and Policy No. 3304 entitled "Reduction in Force: (RIF)." These policies also appear in similar handbooks for the two prior school years. The parties stipulated that both policies were fully effective at all relevant times. As a member of the defendant's certificated staff, the plaintiff was required to be aware of and comply with the published policies. The plaintiff possessed that awareness. The parties' contentions revolve around these two policies.

5. Policy No. 3303 ("Discharge and Retention") states:

> The procedure for discharge and retention will be in accordance with Nebraska School Laws Section 79-1254 and 79-1254.02. In addition to section 79-1254, Nebraska State School Laws, the 1st day of February of each

> year is hereby designated as the date of notification of unsatisfactory performance and of the possibility of not rehiring an individual teacher. Contracts or the notification of termination or [sic] employment shall be given on the Wednesday following the second Monday in March. Those contracts given at this time shall be signed by the proper representative of the school system. The teacher shall have 10 days from the date of receiving his/her contract in which to accept their contract.

Exhibit 3. In 2002, the Wednesday following the second Monday in March fell on March 13.

6. Policy No. 3304 ("Reduction in Force: (RIF)") sets forth in considerable detail the principles to be applied and procedures to be used in a reduction in force. At the end of a paragraph on procedures, the policy states: "Dates of notification shall correspond with those of the continuing contract law."

7. By letter dated March 26, 2002, the defendant's administrative representative informed the plaintiff that the board of education intended to consider the termination of her employment as a reduction in force at the conclusion of the 2001-02 contract year. By letter on March 27, 2002, the plaintiff requested a hearing regarding the possible reduction in force. Prior to the hearing, the plaintiff's legal counsel informed the defendant's attorney that the plaintiff would not be attending the hearing because of the plaintiff's claim that the defendant failed to give notification by March 13, 2002. On April 22, 2002, the board of education held the hearing and adopted a resolution terminating the plaintiff's employment as a reduction in force.

8. The results of the hearing do not bind the plaintiff on the issue of adequate notice. The plaintiff would be bound by factual determinations made by the board of education within the scope of their jurisdiction while functioning in a quasi-judicial capacity. But if the entire proceeding is void or voidable because of improper or insufficient notice, the results of the proceeding cannot cure the deficiency. *Bentley v. School Dist. No. 025*, 255 Neb. 404, 586 N.W.2d 306 (1998). The doctrines of res judicata and collateral estoppel cannot determine the issue presented in this case.

9. Generally, statutes in existence at the time of execution of a contract become part of the contract as if set forth therein. *Bauers v. City of Lincoln*, 255 Neb. 572, 586 N.W.2d 452 (1998). The Nebraska statutes relating to the plaintiff's employment contract are deemed as part of the contract.

10. Because the plaintiff was a permanent certificated employee, § 79-829 applies to the plaintiff's contract. That section states:

> The contract of a permanent certificated employee shall be deemed continuing and shall be renewed and remain in full force and effect unless amended or terminated in accordance with the provisions of sections 79-824 to 79-842. The school board by a vote of the majority of its members may determine that such permanent certificated employee's contract shall be amended or terminated for any of the following reasons: . . . (2) reduction in force as set forth in sections 79-846 to 79-849, . . . ; (3) failure of the certificated employee upon written request of the school board or the administrators of the school district to accept employment for the next school year within the time designated in the request, except that the certificated employee shall not be required to signify such acceptance prior to March 15 of each year . . . .

NEB. REV. STAT. § 79-829 (Reissue 1996)

11. Section 79-831 requires that "[a]ny probationary or permanent certificated employee whose contract of employment may be amended, terminated, or not renewed for the next school year shall be notified in writing *on or before* April 15 of each year of such possible action on the contract. . . ." NEB. REV. STAT. § 79-831 (Reissue 1996) (emphasis supplied).

12. This court agrees that statutory procedures relating to teacher contracts in many instances provide for a minimum procedure and do not preclude a school district from adopting a more restrictive procedure not in conflict with the statutory procedures. A Class III school district possesses the statutory authority to "make its own rules and regulations not inconsistent with any statute applicable to such district." NEB. REV. STAT. § 79-520 (Reissue 1996). This court assumes, without deciding, that it is legally possible for the defendant to have established an earlier binding deadline for notification to a teacher of

possible termination or amendment. The heart of the issue concerns the interpretation of the contract as a whole and the construction of Policy No. 3303.

13. Except as controlled by statute, the validity of a contract of employment of a teacher in the public schools is governed by rules relating to contracts generally. *Drain v. Board of Educ. of Frontier County*, 244 Neb. 551, 508 N.W.2d 255 (1993); *Greer v. Chelewski*, 162 Neb. 450, 76 N.W.2d 438 (1956). The terms of a contract are to be accorded their plain and ordinary meaning as ordinary, average, or reasonable persons would understand them. *Johnson Lakes Dev. Inc. v. Central Neb. Pub. Power & Irrig. Dist.*, 254 Neb. 418, 576 N.W.2d 806 (1998); *Daehnke v. Nebraska Dep't of Soc. Servs.*, 251 Neb. 298, 557 N.W.2d 17 (1996). The determination of whether a contract is ambiguous must be made on an objective basis, not by the subjective contentions of the parties suggesting opposing meanings of the disputed language. *Id.* A contract must be construed as a whole and, if possible, effect must be given to every part thereof. *Id.* A party may not pick and choose among the clauses of a contract, accepting on those that advantage it. *Id.*

14. Policy No. 3303 incorporates by reference § 79-1254. That section was repealed in 1982. But as the defendant correctly notes, where one statute refers to another and the latter is subsequently repealed, the statute repealed, absent contrary legislative intent, becomes a part of the one making the reference and remains in force so far as the adopting statute is concerned. *Sanitary & Imp. Dist. No. 1 v. Nebraska Pub. Power Dist.*, 253 Neb. 917, 573 N.W.2d 460 (1998). Section 79-1254 previously constituted the principal statute of the "continuing contract law" regulating a Class III school district. NEB. REV. STAT. § 79-1254 (Reissue 1981) (repealed in 1982). Regarding notice, § 79-1254 formerly stated: "The secretary of the board shall, not later than April 15, notify each . . . teacher in writing of any conditions of unsatisfactory performance or other conditions because of a reduction in staff members . . . of the board of education which the board considers may be just cause to either terminate or amend the contract for the ensuing school

year." *Id*. Thus, Policy No. 3303 effectively specifies three dates: April 15 by reference to § 79-1254, February 1, and the Wednesday following the second Monday in March.

15. This court must emphasize that the disputed language originated as policy language adopted by the defendant pursuant to the statutory authority to make rules and regulations. The policy became part of the contract by reference, in much the same manner as statutes are considered part of a contract. In prescribing such regulations, the board of education acts legislatively, within the scope of authority delegated by the Legislature. The interpretation of a regulation presents a question of law. *Randall v. Department of Motor Vehicles*, 10 Neb. App. 469, 632 N.W.2d 799 (2001). Just as a statute may have mandatory or directory provisions, a rule or regulation may also have mandatory or directory provisions. *Id.*

16. There is no universal test by which directory provisions may be distinguished from mandatory provisions. *State v. Jensen*, 259 Neb. 275, 609 N.W.2d 362 (2000). As a general rule, the word "shall" is considered mandatory and inconsistent with the idea of discretion. *Id*. While the word "shall" may render a particular provision mandatory in character, when the spirit and purpose of the regulation requires that the word "shall" be construed as permissive rather than mandatory, such will be done. *Id*. If the prescribed duty is essential to the main objective of the regulation, the provision ordinarily is mandatory, and a violation will invalidate subsequent proceedings under it. *Id*. If the duty is not essential to accomplishing the principal purpose of the regulation but is designed to ensure order and promptness in the proceeding, the provision ordinarily is directory, and a violation will not invalidate subsequent proceedings unless prejudice is shown. *Id*. A legislative enactment providing that an act be accomplished within a specified time period, with no sanction for failure to comply with that mandate, is directory. *Randall v. Department of Motor Vehicles, supra*.

17. Policy No. 3303 specifies no sanction for failure to comply with either the "February 1" or the "Wednesday following the second Monday in March" date. The

sentence emphasized by the plaintiff does contain the word "shall." However, the designation of these two earlier dates for teacher notification is not essential to accomplishing the principal purpose of the regulation. Compliance with the "continuing contract law" formerly embodied in § 79-1254 as incorporated in the regulation, although now codified elsewhere in the statutes, constitutes the main objective. That law requires notice to the teacher by the statutory deadline of April 15. The "continuing contract law" specifies the sanction, namely the continuing effect of the contract. The two earlier dates in Policy No. 3303 appear designed to ensure order and promptness in the proceedings. Consequently, this court determines that the "February 1" and the "Wednesday following the second Monday in March" dates in Policy No. 3303 constitute directory provisions and not mandatory provisions.

18. This interpretation concurs with the notice language of Policy No. 3304. This reduction-in-force policy expressly refers to notification dates "correspond[ing] with" the continuing contract law. Construing the incorporated reference to the continuing contract law as the mandatory provision and the other two dates as directory provides a sensible and logical interpretation consistent with the spirit and purpose of the policy and its statutory foundation. The plaintiff's interpretation does not comport with the spirit and purpose of the policy and related statutory provisions. The plaintiff's evidence shows no prejudice arising from the notice given in compliance with the statutory deadline.

19. This court concludes that the notice given complied with the statutory requirements and the failure to comply with the directory provisions of Policy No. 3303 does not affect the validity of the proceeding. The record conclusively establishes that the defendant did provide the required hearing. The plaintiff did not seek review of the decision made following the hearing by appeal or petition in error. Because this court rejects the plaintiff's contention regarding notice, the plaintiff's petition seeking to collaterally attack the defendant's decision must be dismissed with prejudice at plaintiff's

cost. Because all costs were incurred by the plaintiff, the defendant receives no judgment for costs.

JUDGMENT: IT IS THEREFORE ORDERED AND ADJUDGED that:

1. Judgment is granted in favor of the defendant, Holt County School District No. 45-0044, also known as Stuart Public Schools, and against the plaintiff, Cherie Bligh, dismissing the plaintiff's petition for declaratory and related relief with prejudice at plaintiff's cost.

2. All requests for attorneys' fees, express or implied, are denied. All claims of any party not expressly determined above are denied. This is a final judgment.

Signed in chambers at **Ainsworth**, Nebraska, on **February 11, 2003**;
DEEMED ENTERED upon file stamp date by court clerk.
If checked, the court clerk shall:

[X] Mail a copy of this order to all counsel of record and any pro se parties.
Done on _____, 20_____ by _____.

[X] Note the decision on the trial docket as: [date of filing] **Signed "Judgment" entered**.
Done on _____, 20_____ by _____.

[X] Mail postcard/notice required by § 25-1301.01 within 3 days, **stating "Petition dismissed with prejudice"**.
Done on _____, 20_____ by _____.

[ ] Enter judgment on the judgment record.
Done on _____, 20_____ by _____.

Mailed to:

BY THE COURT:

William B. Cassel
District Judge